

2010 California Water Law Symposium:
“Who Controls the Water? Reforming California Water Law Governance in an Age of Scarcity”

University of San Francisco School of Law
January 30, 2010

**(Notes for the California Water Plan Update 2009 Tribal Water Summit Planning Team taken by
Beth Rose Middleton, with review/comments from Bill Jacobsen and Frank Ramirez,
contact Beth Rose if you have questions bethrosy@gmail.com)**

...the Symposium has brought together leading water law and resource authorities to discuss California's critical water issues and strategies to protect our supplies. We provide a forum for articulating different ideas and perspectives, offer an educational venue for practitioners and students of law and the environment, and create opportunities for students, practitioners, and academics to converse. – Dr. Susan Gilbert-Miller, Chair, 2010 California Water Law Symposium

Dedication

This year's Symposium honors Tom Graff, “godfather of environmental politics,” and founder of Environmental Defense Fund. In 1972, Mr. Graff argued the first decision under the California Environmental Quality Act (*Environmental Defense Fund v. Coastside County Water District*). From 1970 on, Graff fought for energy and water conservation: In 1991, he helped pass the Central Valley Project Improvement Act, which restricted the amount of water that could be diverted out of the Delta, leaving enough water for Delta fish; Graff also developed the concept of a “water market” in which farmers could sell water they did not use, encouraging conservation. In 2006, Graff helped to pass AB32, the California Global Warming Solutions Act.

David Sandino: “The Landscape: Introduction to CA Water Law Governance Issues”

[David Sandino is Chief Counsel at the California Department of Water Resources, focused on Environmental and Energy Issues, oversees 32 attorneys; and a USF School of Law Professor]

The Economist recently had a special on California water issues; *60 Minutes* had a segment; the National Academy of Sciences met at UC Davis to discuss Delta issues; and the California state legislature recently passed the California Water Law Reform Package. California water politics are driven by hydrology (2/3 of the water falls on the north state, but 2/3 of the people live in the south), and variability. As of December 1, 2009, the State Water Project's delivery projections were only at 5%, and Lake Oroville was at 50% of average.

There are two major water infrastructure projects in California: the Central Valley Project, which is federal and managed by the Bureau of Reclamation, and includes Shasta Dam/Lake, Folsom Lake, and other facilities. The State Water Project is managed by California's Department of Water Resources, and includes Oroville Dam/Lake, and brings water to the San Joaquin Valley and Southern California, and over 25 million California residents. There are also local water infrastructure projects, such as the City of San Francisco's dam and conveyance system from Hetch Hetchy.

California water issues include:

- Regional issues, such as the Sacramento/San Joaquin Delta, where we are concerned about urban water supply, agriculture, fish and wildlife, and recreation
- Water supply concerns: the total supply consists of both surface and ground water, about 120 million acre feet total, but in dry years there is not enough for agriculture, environmental, and urban needs. In those dry years we do water transfers (which are full of uncertainties, but allow transferring water from agricultural users not using it to environmental and other agricultural users), and we overdraw our groundwater. Look at the California Water Plan 2009 for more information.
- Environmental issues: there are legal requirements for in-stream flows, Delta outflow, endangered species protection, and wild and scenic river preservation. The 2008 Delta Smelt and 2009 Salmon Biological Opinions were created to improve habitat/ population, and avoid extinction. They also reduced the supply from the Central Valley Project and the State Water Project by 30%, illustrating the clash between environmental water needs and agricultural/urban needs. The California population growth is high: how do we ensure that there is enough water for 38 million people?
- Climate change: water is also stored in the “natural reservoir” of snowpack, but that is decreasing. We may lose 4-5 million acre feet 60-70 years from now.
- California water governance is very complex, and includes
 - Federal agencies, such as: Environmental Protection Agency, Bureau of Reclamation, Army Corps of Engineers, and the US Fish and Wildlife Service
 - State agencies, such as the State Water Resources Control Board (regulates surface water rights), Department of Water Resources, California Public Utilities Commission, California Department of Fish and Game
 - Local government: cities, counties, water agencies
 - Stakeholders: urban, agriculture, tribes [Note: extremely problematic that tribes are classified as stakeholders, rather than another government entity]
 - Congress: legislative decisions about California water
 - Courts: at federal, state, and local levels

As Judge Roby said at this conference last year, “The history of California is written on its waters.”

The new water legislation (California Water Law Policy Reform Package) addresses Delta governance, sustainability, infrastructure, supply, conservation, and other components.

Stuart Drown: “Addressing the Issues of California’s Water Governance”
[Little Hoover Commission]

The Little Hoover Commission has held four meetings on increasing efficiency, transparency, accountability, and the fit between goals and outcomes in California governance. The Commission is composed of nine citizens, and four lawmakers, all appointed by the Governor/legislature. They have advisory committees, and they interview stakeholders/ key players. They don’t work on consensus; they vet issues. They are focused on reforming the

executive branch, and improving state programs through reorganization and structural change. They want to change the California government to an outcome-based culture, in which data drives decision-making. They work on multiple topics, including mental health, prisons, and water. In 2005, the Governor asked them to look at CALFED; and in the past they have looked at California water boards.

Drown is concerned that water policy and governance could be determined in a federal court, which is often a sign of failed government. Court decisions may not meet the state's long-term needs. The Little Hoover Commission is looking for government strategies that can meet long-term water recommendations. The Delta has to be fixed, but the flawed water rights system and the Endangered Species Act cannot be thrown out. The Commission held four public hearings about water.

[Note from Bill Jacobsen: Wonder what, if any, tribal members attend meetings or have consultations with the Commission. This is important if tribes are to have input into their strategies that meet "long-term water recommendations," which they are drafting.]

Keynote speaker: Assemblyman Jared Huffman (6th District)

Assemblyman Huffman worked on the California Water Law Policy Reform Package, which focuses largely on the Delta. The Delta involves 200 agencies, major environmental issues, ongoing litigation, water quality/ predictability concerns, and levee problems.

The California Water Law Policy Reform Package consists of

- SB-1, Delta Governance: creates a 7-member Delta Stewardship Council focused on developing a Delta Plan for ecosystem health and water reliability. SB-1 also establishes a Sacramento-San Joaquin Delta Conservancy to oversee Delta ecosystem restoration; and restructures the Delta Protection Commission from 23 to 15 members, tasked with developing an economic sustainability plan for the Delta. According to Huffman, "We need to reduce our dependence on the Delta for water supply. After the Plan is created, the Council will analyze whether agencies are aligned with it." Huffman also emphasized the challenges of SB-1, in selecting the seven members for the Council, for example, he doesn't want to see people selected based on "...stakeholders or regional representation," he wants to see "independent, competent folks." The funding of the Council will also be a challenge; they have funds for the first year of administration, and are working on legislation that would support the Council and help develop long-term financing. They don't want to leave the Council financially "stranded, like the Bay Delta Authority."
- SB-6, Groundwater monitoring: requires local agencies to monitor the elevation of their groundwater basins, in coordination with the California Department of Water Resources. According to Huffman, "Groundwater was 40% of the California water supply in 2009, but California does not regulate/report/manage it at the state level. Now this bill requires that basins and sub-basins report groundwater elevations."
- SB-7, Statewide water conservation: requires the development of agricultural water management plans, and requires urban water users to reduce use 20% by 2020, in

coordination with the California Department of Water Resources and the State Water Resources Control Board. According to Huffman, “This is the first time a numeric target has been set for urban water conservation. It also requires [agricultural users] who irrigate over 12,000 acres to set targets for reduction. Its baby steps, but it’s a milestone.”

- SB-8, Water diversion and use/ funding: promotes stronger accounting for water diversion and use in the Delta, partially by funding additional State Water Resources Control Board (SWRCB) staff; penalizes unauthorized diversions; appropriates funds for stormwater management, conservation, and flood protection in the Delta. According to Huffman, this bill increases “...water rights enforcement by assessing higher penalties, and increasing SWRCB personnel to enforce water rights.”
- \$11.14 billion water bond for:
 - drought relief, including water conservation projects (\$455 million);
 - Delta sustainability (\$2.25 million);
 - water supply reliability: funds allocated for water quality, security, conveyance to 12 California regions (\$1.4 billion);
 - statewide water system operational improvement: additional surface and groundwater storage projects, and maintenance/improvement of existing projects (\$3 billion);
 - groundwater protection and water quality (\$1 billion);
 - water recycling and water conservation: advanced treatment methods, and help to urban water users working to achieve SB-7 conservation targets (\$1.25 billion);
 - conservation and watershed protection: ecosystem and watershed protection and restoration in 21 California watersheds, includes \$75 million to Sierra Nevada Conservancy, \$100 million for forest restoration, and \$250 million for Klamath dam removal (\$1.785 billion).

According to Huffman, the bond is a major investment in California water, including infrastructure and watershed restoration.

Huffman commented particularly on SB-1, which includes a call to the Council to develop a Bay Delta Conservation Plan. This involves state and federal agencies and stakeholders in developing a Habitat Conservation Plan/ Natural Communities Conservation Plan for an aquatic project. The legislation requires analysis of alternatives for conveyance and operation.

The Bay Delta Conservation Plan has to incorporate new public trust flow criteria being developed by the State Water Resources Control Board over the next nine months/ simultaneous with the draft Environmental Impact Statement, which is also due in nine months. These due dates seem to be driven by the Governor’s final year, and will have to change.

One concern with the Bay Delta Conservation Plan is that agencies working to get public confidence in this conservation plan are also lobbying to reduce protections for the Delta smelt, including in-stream flow criteria. What do public trust resources require in terms of flows? There is a proposed peripheral canal, but how much water needs to stay in the Delta? By calling on the

State Water Resources Control Board to develop quantitative public trust flow criteria, the legislature put this back in front.

Another big challenge is engaging the federal government. They are the largest water rights holder in the state. The Endangered Species Act is a big player in the Delta. The 2009 California Water Law Reform Package invites the federal government to follow our lead by following the Coastal Zone Management Act, in which federal agencies are supposed to be consistent with State plans. The Package and the Bay Delta Conservation Plan may set precedents for regulating the federal agencies via State water permits. The federal agencies have been supportive, but there are uncertainties, particularly in Central Valley politics this year. The federal government has not yet stepped forward as a full partner.

Question on conveyance facilities and how they affect the balance of use versus environmental safeguards: According to Huffman, you use water from the Delta when the fish aren't there, and stop when they are; but when you build a facility with high export capacity, people will push to keep it at that use level even when it's destructive. It would be best to propose a smaller system.

Question on "clean-up" legislation to fix parts of the California Water Law Reform Package: According to Huffman, the water enforcement tools may require re-analysis; and we need to look at the funding in the bond, for example, a provision was snuck in that allows private investors to get money from the public for facilities, and he believes this is illegal and should be removed.

Question regarding the affect of a new governor on the Package: the policy reforms included in the Bills do not depend on the bond, but achieving the goals successfully does depend on the money.

Question on dealing with private landholders in the Delta, and bringing them on board with these policies: The Delta Vision identified 100,000 acres of interconnected habitat that needs restoration; we know that agriculture is important in the Delta but in some places it is unsustainable (subsidence is up to twenty feet), and we need to identify those places, and do cooperative planning with private landowners. We are not planning to use eminent domain.

Question on sewage dumping in the Delta by the cities of Sacramento and Stockton: there are many stressors on the Delta, including water exports, pollution, and invasive species. We need to look seriously at pollution and regulate Sacramento's ammonia discharge in particular.

"Debating the Issues: the 2009 Water Legislation"

Moderator: Richard M. Frank (UC Berkeley School of Law, Center for Law, Energy & the Environment)

The California Water Law Policy Reform Package was signed in November. Impetus for the Package included the declining Delta ecosystem; CALFED stalling; Sacramento's need for policy success; the Endangered Species Act litigation; and the Delta Vision Task Force recommendations. Most of the Task Force's recommendations were adopted, including the creation of the 7-member Delta Stewardship Council, a centralized government model; the changes to the Delta Protection Commission, including focusing it more on local/regional

governments and agriculture; the creation of a Delta Conservancy to coordinate ecosystem restoration; a new Delta “watermaster;” a new Delta independent science board (consisting of 10 scientists appointed by the Delta Stewardship Council); and the call for the State Water Resources Control Board to develop flow criteria for the Delta ecosystem.

The Delta Stewardship Council members will include the following: one member will be the Chair of the Delta Protection Commission; four members will be appointed by the Governor; one will be appointed by the California Senate; and one will be appointed by the California State Assembly. The goal is to adopt the Delta Plan by January 2012 (similar to the way the California Coastal Commission created a plan for the Coast), and there should be consistency between local and state actions. Local actions can’t necessarily be stopped, but they can be declared inconsistent with the Plan.

The \$11.14 billion water bond needs to be approved by voters, while the other four bills in the Package take effect in February 2010. It was a key point of negotiation that the bond was decoupled from the other bills. Key issues with the bond are General Fund indebtedness; taxpayer versus “user pays” models; water privatization; and the various projects that may not belong in the Bond Act, such as benefits for districts around the State, which built support for the bond, but may not be appropriate.

A few more thoughts on the specific bills:

- SB-6 addresses the current lack of groundwater monitoring by requiring monitoring and reporting on groundwater basin levels based on water extraction. Local agencies are supposed to take this on, but the Department of Water Resources will serve as a fallback, and be responsible for aggregate data.
- SB-7 calls for statewide per capita water reductions of 20% by 2020 and urban water districts must reduce use by 10% by 2015, and 20% by 2020. There is no quantitative reduction requirement for the agricultural sector, but if they don’t meet requirements to submit Agricultural Water Management Plans (beginning in 2012) regarding water efficiency measures, they will be ineligible for state grant funding supporting water conservation and efficiency.
- SB-8 expands reporting requirements for surface water diversions and eliminates exemptions for in-Delta diverters. There will be 25 new State Water Resources Control Board water rights enforcers. SB-8 also appropriates \$546 million from Propositions 1E and 84 for Delta water supply reliability and Natural Community Conservation Plans.

Panelist: Alf W. Brandt: Committee on Water, Parks, & Wildlife, California State Assembly

We need to build relationships with people who opposed the legislation in the Delta, including the County Supervisors in the Delta. The changes to the Delta Protection Commission (in SB-1) focus on making it the local voice. One challenge of the Delta Stewardship Council is that they can’t review regulatory actions. Another challenge to the process is that federal government involvement is a question. Will the federal government participate, for example, in the in-stream

flow criteria process? The Bureau of Reclamation runs the Central Valley Project, and they are supposed to follow the Bay Delta Conservation Plan. The legislative decisions can't handle all of the details; it takes agencies and science. Alf was the coordinator for CALFED, and the 2000 Record of Decision under CALFED ultimately could not do adaptive management. Litigation is not the best answer. You have to make trade-offs, and focus on priorities.

[Note from Bill Jacobsen: It is odd that he states that the Bureau of Reclamation is “supposed to follow” the Bay Delta Conservation Plan. This implies that they will not. It may be very important for us to dissect the Bay Delta Conservation Plan, the agencies, NGO's, private interests, etc., to uncover ways in which tribes can have a voice in each of the Senate bills ratified in November 2009.]

Panelist: Timothy Quinn, Association of California Water Agencies

This is a big change, and it is very difficult. He asked his board (California water districts) to support the California Water Law Policy Reform Package and they did, but with some rancor. He represents public, for-profit agencies, many with Joint Powers authorities (JPAs). The Natural Resources Defense Council (environmental group) supported this Package as well. Our California water system was built when there were 18 million people, and it was designed at a time when the environment was not valued; the economy was the highest value. Now sustainability is a value. The legislation codifies this co-equal goal. You don't have to sacrifice agriculture or economy.

[Note from Bill Jacobsen: The “co-equal goal” appears to be the sound byte that defines how the Bay Delta Conservation Plan should be a “collaborative” process. Perhaps the Tribal Communication Committee” can be a Tribal voice that seems to now be missing. Or, better yet, we create a small Tribal representation team that dissects and addresses the “inequalities” of the new water legislation.]

Panelist: Kate Poole, Natural Resources Defense Council (NRDC)

The NRDC, Environmental Defense Fund, urban (Metropolitan Water District), agriculture (Westlands, in particular) all supported this California Water Law Policy Reform Package. We agreed that the status quo of California water management is unsustainable and requires change. Three steps are key in the Package:

1. environmental safeguards are key to restoring the Delta (requirements for the State Water Resources Control Board to quantify public trust flow requirements);
2. imposed the highest restoration standard in state/federal law on the peripheral canal, which requires restoration, not just “life support” (Endangered Species Act);
3. paradigm shift: looking at demand management, reducing dependence on the Delta, investing in conservation (NRDC co-sponsored SB-7, the water efficiency bill, which is the first bill to set per capita water efficiency targets for urban users. We initially had the same requirements in the bill for agricultural users, but those were removed in compromise.

Panelist: Mariko Yamada, Assembly-member Representing the 8th Assembly District

Yamada is a social worker, and she is speaking up for disadvantaged populations. No Delta legislator has his/her name on these bills, and they were not included in the process/politics of bringing these bills to pass. There are some good things in the legislation, but the most affected sector was disenfranchised. We need outreach to Delta legislators. We don't want to see wars. The last time there was a war in the US, the North won. Legislative lynchings also must stop.

Tim Quinn: Agricultural users don't want to sacrifice for environmentalists or urban users. We need to partner with the people in the Delta. We need to change land use practices in the Delta, we need willing sellers; we don't have eminent domain.

Question: What are the best/worst parts of the California Water Law Policy Reform Package?

Alf Brandt: The best aspects are the Delta Stewardship Council and the Bay-Delta Conservation Plan, which link water and land use.

Tim Quinn: The best aspect is co-equal goals; the worst is that we need an incentive-based program to reduce water use. You can't regulate conservation.

Kate Poole: The best is the State Water Resources Control Board quantification of public trust flow requirements; the worst are the misunderstandings. For example, this legislation did not authorize the peripheral canal.

Mariko Yamada: I voted no on all of the bills. One better part of the bills is the 20% water use reduction target. The worst aspect is the governance: The Delta Stewardship Council will have seven members, four of whom will be appointed by a governor who will leave office soon, and one from the Delta Protection Commission. That cedes power from the legislature to a non-elected body over one of the most important water sites. We need more public oversight. Also, there is a conspicuous silence in the legislation about the peripheral canal.

[Note from Bill Jacobsen: The Delta Stewardship Council will be a very important council. There should be a Tribal role on the council. If not the council, then tribal consultation committed. It is crucial that we follow the development and implementation of this council so as to ensure that indigenous voice is part of their dialogue.]

Question from Dr. Tim Duane: Making ecological goals co-equal in the Federal Energy Re-licensing Commission (FERC) process in 1986 led to the potential deal on the Klamath today; did the FERC experience lead to this, and is this a fundamental change to the criteria we use in making decisions?

Tim Quinn: The Delta Stewardship Council is to look at co-equal goals; political instability in system to achieve co-equal goals.

Kate Poole: There have been seven efforts in the last eight months to waive the Endangered Species Act in California water, which undermine co-equal goals.

Question: What is the baseline for determining 20% reduction?

Kate Poole: How do you not penalize people who have invested in conservation (like the City of Los Angeles, which has grown by 1 million, but uses the same amount of water as it did 20 years ago)? We are trying to account for investments.

Tim Quinn: Ten-year historical average, reliance on recycling water (10% or more) can extend five years. There are four ways to measure compliance. We fought for money in the bond to help districts make business sense out of conservation. The 450 local water boards like their sovereignty.

Alf Brandt: Is the Delta Stewardship Council a bad idea, given Assemblywoman Yamada's comments? We had a mix of negotiations, including Delta involvement. The Councilmembers need to be appointed by February 3, which will give the new governor an opportunity. The Senate also has to confirm Councilmembers if they are to serve for more than one year.

Tim Quinn: The Delta Stewardship Council brings the Delta clout. The Delta Conservancy will manage money. The Delta Land Protection Commission has land.

Mariko Yamada: Lois Wolk was not part of the final negotiating committee. You can't have all of the Delta or none of the Delta. It is problematic that the Package development included no respect for the area of origin.

[Note from Bill Jacobsen: Lois Wolk should have been in the final negotiating committee, as she has shown sensitivity to many ecological issues. Follow up on how she was excluded may help in Tribal interests aligning with her in future water reform policy and legislation development]

Tim Quinn: One problem with the Bay Delta Authority was that people were protecting their turf; so it didn't work.

"Surface Water Systems: Managing the Future Flow"

Moderator: John D. Leshy, UC Hastings College of the Law

Given the recent legislation and the challenges facing California water, is the State Water Resources Control Board up to the task (legal, financial, infrastructural, political)?

Panelist: Arthur Baggett, Jr., State Water Resources Control Board

Yes, given resources and efficient laws, but the challenge is the political will. The physical solutions and settlements may need help. The Yuba took 20 years to settle. The *Ex parte* rules prevent a hearing officer from being involved in the settlement, yet that helps force a solution. How do we get a record to base decisions on, especially regarding public trust/ evidence? There are four attorneys and 84 staff, and that is not enough. Every public utility commission has intervenor status, but we do not. In the Imperial Irrigation District transfer, six non-governmental organizations, lawyers, etc., were involved, and that is not usual. We need to fund an intervenor statute, and we need a full complement of attorneys. Water law is very complex in California. I

recommend having two attorneys on the Board instead of five, to deal more efficiently with small cases. We want more settlement time out of court, to hammer out agreements between different factions. Funding, physical solutions, and political will solve issues, like the low-flow toilets in Los Angeles helped to address the lowering of Mono Lake.

Panelist: Jason Peltier, Westlands Water District

The State Water Resources Control Board is underfunded, and that is a big institutional issue. The challenges are the same for them in terms of conservation and recovery, and trying to determine how much habitat is needed. The biggest issue is scientific uncertainty, even as we now believe that sustainability is the way to go.

Panelist: Roderick Walston, Best, Best & Krieger, LLP

The State Water Resources Control Board is the primary agency regulating water rights, although California courts are taking it upon themselves to deal with water rights (i.e., the “American River case,” or *Environmental Defense Fund v. East Bay Municipal Utility District*, 1986). These cases should go first to the State Water Resources Control Board, but the court said it had original jurisdiction. Three years later was the Mono Lake case (*National Audubon Society v. Superior Court*) and he argued on behalf of the state (and the court held that the public trust doctrine applies to water rights).

[Note from Bill Jacobsen: The public trust doctrine is an important doctrine that needs to be understood in-depth.]

Panelist: Richard Roos-Collins, Natural Heritage Institute

The culture of water law should change from war to governing more efficiently. He served as Cal Trout’s Council in the Mono Lake litigation in 1991, and learned that we need to require settlement conferences, with settlements to come before the State Water Resources Control Board.

[Note from Bill Jacobsen: Richard Roos-Collins has provided Sierra Salmon Alliance with invaluable legal guidance in the FERC process. He and Art Baggett, Jr. are reminding us that the FERC relicensing process can benefit tribal water rights and settlements that are significant to socio-economics, water, salmon, and cultural restorations. We need to find monetary resources that can keep us engaged in numerous ongoing and upcoming re-licensings in the Sierras and Central Valley.]

Art Baggett, Jr.: The State Water Resources Control Board’s look at Public Trust Resources is a study, not the final determination. We will meet the deadline.

Panelist: David Nawi, US Department of the Interior

The State Water Project and the Central Valley Project will coordinate. In 1986 we coordinated an operations agreement. We will bring in the regulatory agencies (National Marine Fisheries

Service, National Oceanic and Atmospheric Administration, US Fish and Wildlife Service, California Department of Fish & Game). There has not always been good cooperation among state and federal fish agencies. There was uncertainty about the Endangered Species Act role.

Under CALFED's 2000 joint Record of Decision, the foundation for collaboration was made between state and federal agencies. Numerous work groups included state and federal players. In September 2009, six federal agencies created a Memorandum of Understanding, joint collaboration/ partnership with the state. The September 22 federal work plan sets an emphasis on state/ federal work together, and calls for joint action plans. This will be out in the next few weeks. Scientific infrastructure is needed, and UC Davis and others will be involved. The state is opposing the federal government in litigation in Fresno, and people are working through the Bay Delta Conservation Plan process. The legislation created the Conservancy and the Commission, which refer to federal participation, and the Delta Stewardship Council, which does not refer to federal participation.

Roderick Walston: The federal agencies don't always cooperate with the state. Thirty years ago the feds and the state were at loggerheads, and the federal agencies said they weren't subject to state laws. So there was litigation. The Supreme Court decided the opposite in 1978. That decision combined with Congressional legislation in 1992 with the Central Valley Project Improvement Act...

Jason Peltier: Bush did not focus on California water issues. Babbitt focused most on CALFED 2000, but Bush went to the most complex issues—fire, border security, and looking at the Columbia, Rio Grande, and Colorado rivers.

Art Baggett, Jr.: Bush did not ignore California water. David Nawi is bringing more coordination.

"It's better to be an upstream junior water rights holder than a downstream senior water rights holder."

Richard Roos-Collins: The biological opinions are intended to protect listed species, but under litigation, that will change. The Bay Delta Conservation Plan is a long term habitat conservation plan. It will involve negotiation between federal, state, and district levels. Agreed by consensus yesterday to a project.

David Nawi: The court and the legislature can't solve issues. We need a long-term science based decisions built on consensus.

Richard Roos-Collins: In 1935, Congress enacted the Federal Power Act. Over time, the Supreme Court interpreted that to mean that Federal Energy Relicensing Commission (FERC) regulates everything. In 1994 we were vindicated under the Clean Water Act, Section 41A, which notes that the state has the authority and whatever is in the allocation goes into the license. The state had direct control. The biggest failing of the Federal Power Act and the Clean Water Act is cumulative impacts of projects. The State Water Project and FERC need an MOU,

especially regarding cumulative impacts. Look at the PG&E bankruptcy and the 2003 negotiation settlement with California Water and PG&E.

Art Baggett, Jr.: Relicensing? Given the Record of Decision under the Federal Power Act, Section 27, the state is responsible for water rights.

[Note from Bill Jacobsen: Critical point as it relates to FERC. Section 401a of the Water Quality Act, gives the state power to overrule FERC relicensing rulings.]

Roderick Walston: The Clean Water Act regulates interstate water, and proposed federal regulations. The purpose is to return Supreme Court decisions. Can Congress regulate all water under the Commerce Act? The constitutionality of the Endangered Species Act: Delta Smelt, endangered species in the Delta, is reducing water to people, but can Congress protect a species with no effect on interstate Commerce? Judge Wanger (Fresno) says Congress has the power to regulate species. There is an alternative argument on species in interstate commerce. Chief Justice Roberts, when on the DC District Court, could not see how the Arroyo Toad could be subject to the federal government under the Commerce Clause.

The Clean Water Act (CWA) built in protection of states, and recognized state powers and regulations. There is deference to state authority under the CWA, but none under the Endangered Species Act (ESA), which has had a big effect on water rights litigation and re-allocation of the California water supply.

David Nawi: The Delta Smelt is also state-listed under the California Endangered Species Act (CESA). Would state restrictions take over if the federal restrictions were trumped?

Roderick Walston: I'm not sure if the Smelt is listed under the CESA. It is impossible to amend the ESA politically, even if the application has adverse affects.

Jason Peltier: When agencies fail, it is hard to carry out the ESA in a balanced fashion. Westlands had six lawsuits regarding the ESA. Federal water contractors are at 40-90% reductions from the ESA, the Central Valley Project IA, and drought. The San Luis Reservoir would fill 80% of the time before biological opinions; now it is at 20% of capacity. Also before the biological opinions, allocations were full every seven years (with reserves), and below every three years. Now it's the opposite. With these cuts, I still don't see much good with returns to fisheries.

Question re: Judge Wagner: Did the Bureau of Reclamation fail to meet National Environmental Policy Act requirements?

Roderick Walston: Wanger held that you have to do an Environmental Impact Statement under the National Environmental Policy Act before biological opinions are issued. You can make a motion to grant a Temporary Restraining Order (TRO) or a preliminary injunction to stay the effect of the biological opinion indefinitely or until the Environmental Impact Statement is prepared.

Richard Roos-Collins: How serious are we about protecting public trust resources and water supply? 1870s legislation in the Department of Fish and Game (DFG) code allowed water for fish. Under DFG 1537, diversions should maintain fish. These laws are underutilized. The Bay Delta Conservation Plan makes sense as an alternative to legislation.

David Nawi: in response to Roderick and Jason, there is controversy over science, but the overall goal under ESA is species protection. A panel met at UCD to look at exports and species. This is different from a judicial opinion that species can go extinct if they are not commercial.

Jason Peltier: We are the first generation of water users facing environmental laws that breach water rights and contracts. It is said that the environmental community measures success by how much you hurt us, but we need to look at broader societal values.

Question: How/ what are State Water Resources Control Board methods going to be to assess the amount of water that needs to be in the Delta to maintain public trust resources?

Art Baggett, Jr.: This is a research project. We will be summarizing current knowledge and developing criteria. It is broader, vague, but we envision a short effort. The report might be as few as 30 pages.

Question for Jason: If a Temporary Restraining Order is used to block the ESA, is Westlands really committed to protecting species in the Bay Delta Conservation Plan?

Jason Peltier: Farmers are going bankrupt. There are big consequences. We are pursuing legal angles, and working on a long-term solution (with parties we oppose legally) at the same time. We have broad social goals: to keep farms going, bring water to cities, and help fisheries. We spend \$15 to \$30 million/ year on Delta science and monitoring, but the science is still not getting the data to define the problems. We will keep working on all fronts.

Richard Roos-Collins: Environmental versus agriculture, but in the room of the Bay Delta Conservation Plan we are trying to do something different. Jason is fighting us outside, but in the room we are trying to engage in collaboration.

Question for David Nawi from Alf Brandt: Legislative Section 85-300, how to comply with federal law and achieve federal/ state cooperation?

David Nawi: It's a challenge of implementation.

Question: The Delta was different before Shasta Dam, Oroville Dam, imported striped bass, swampland reclamation, etc.—which Delta is the State Water Resources Control Board returning to?

David Nawi: Probably Jeff Mount at UCD also makes this point of 'what are we restoring to?' Something defined as sustainable under the State Board and the Bay Delta Conservation Plan process.

Richard Roos-Collins: The public trust doctrine goes back to Rome. In the Mono Lake cases in 1989 (*California Trout, Inc., et al, Plaintiffs and Appellants v. State Water Resources Control Board, et al., Defendants and Respondents*; *City of Los Angeles, et al., Real Parties in Interest and Respondents*) and 1990 (*California Trout, Inc. v. Superior Court of Sacramento County, Respondent; Department of Water and Power of the City of Los Angeles, et al., Real Parties in Interest*) we treated the infrastructure as a baseline and required Los Angeles to use the infrastructure and its rights to protect and restore the public trust.

Jason Peltier: The levees trained tidal flows, invasive aquatic species, etc.; its more than farmers vs. fish, the conflicts are more complex. What environment do we want, and what level of water supply reliability? If you ask me to stop farming Westlands, then I am going to ask you to move out of San Francisco. Water is imported in both places.

Question on how the State Water Resources Control Board will incorporate climate change projections into its study to quantify how much water should be in the Delta to meet public trust needs.

Art Baggett, Jr.: We can't meet our deadline if we look at climate change. It would make it too complex. It is coming.

Richard Roos-Collins: 50 percentile flow will become 10 percentile flow in 10 years. In the Bay Delta Conservation Plan we are including alternative scenarios. For example, if hydrology changes in X way, we will respond with X mitigation packages.

Jason Peltier: We are trying in the Bay Delta Conservation Plan to incorporate climate change. It's not as dire for us yet as it is for much of the world. We are trying to keep people in business over the next five years.

"California's Groundwater: New Demands on Underground Waters"

Moderator: Paul Kibel, Golden Gate University School of Law

Until the 1903 decision (*Katz v. Walkinshaw*) establishing correlative water rights, California groundwater was governed by the English common law rule of capture: if you could pump it, you were immune to suit. With *Katz v. Walkinshaw* in the California Supreme Court, this was repudiated. The decision established that you have to take the needs of others into account. Riparian rights have been recognized since English Common Law. In a 2006 case involving the Imperial, a claim of capture was raised.

Reporting requirements: We now have requirements to report groundwater use to the state, and riparian surface water diversions also need to be reported to the state.

Public trust doctrine: The public trust doctrine is applicable to surface waters, but is it applicable to groundwater? Does the public trust apply? Private property conceptions have persisted longer in groundwater.

Andrew H. Sawyer, State Water Resources Control Board (SWRCB)

Groundwater is a huge part of the California water supply. In a dry year, groundwater makes up 39% of California's use, and 20% in a wet year. Most of this use occurs in the Central Valley. Of the 19 Western states, 17 have groundwater management programs. While we have the most use occurring in California, we don't have groundwater management. Water quality is regulated under the SWRCB, but quantity is unregulated.

The Department of Water Resources' Bulletin 118 (2003) identified eleven over drafted basins. In 2009 the USGS did a study of the Central Valley, and a 2009 NASA study showed 1-3 million acre/feet/ year of overdraft since 2003, not including 2009, which was also a high use year. Groundwater and surface water interact: the water moves back and forth.

The Water Code applies the SWRCB licensing scheme to surface water and to subterranean streams, which are waterways moving underground, like the Carmel River. Subterranean streams (defined as being confined to a subsurface channel) are not just under stream channels. For example, in the Carmel River, there is a ½ mile-wide channel, and people have drilled wells along the river, next to the stream. That is common around subterranean streams. When the SWRCB noted that this was a subterranean stream, there were municipal wells. There is no enforcement. People believed they had groundwater priorities. Look at Garrapata Creek in Monterey County (*State of California, State Water Resources Control Board, Decision 1639, 1999*).

Los Angeles v. Pomeroy (1899) 124 Cal. 597 dealt with subterranean streams. The State Water Board decision in 1999 adopted a four-part definition of a subterranean stream. The San Luis Rey River. Pauma Valley. Professor Joseph Sax (UCB) recommended an Impact Test through which the SWRCB would raise permitting authority. *N. Gualala Water Company v. SWRCB* in 2006, 139 Cal. App. 4th 1577.

The window of opportunity for different test (Sax, etc.) has closed. We are using an archaic test. Sax also recognized his test wouldn't look at surface and groundwater interactions. Sax said to use the Water Code Sec. 275.

Kevin O'Brien, Downey Brand, LLP

Groundwater in California is managed locally; just not through a central system. This local management is done well in the Sacramento and Santa Clara valleys. In other areas, management is not very effective. In the North Gualala decision (2 productive wells, 300 feet from the river, 50 and 150 ft. deep, respectively) were groundwater uses subject to State Water Resources Control Board jurisdiction? In Colorado look at tributary versus non-tributary groundwater. We are attempting to apply old scientific concepts (subterranean stream flow) in a science contexts today that says these concepts don't actually match scientific reality.

Is it defined as percolating groundwater or subterranean stream flow? Determining direction of flow. All groundwater is flowing from high to low elevation. The flow under wells is not associated with the Gualala River.

The first appellate case interpreting water section 100. The flow met requirements of a four part test because of the Department of Fish and Game theory on unique geology and flow is related to the river. Standard of review. North Gualala. Controversy over course and scope of subterranean streams; is a broad alluvial valley a subterranean stream? Prof. Sax was before N. Gualala, but his statement is still valid.

Andrew Sawyer: Groundwater managed for groundwater, not surface water.

Chris Frahm: Management of groundwater occurs in many parts of the state, and state regulation may not be needed. Groundwater is a “local resource.”

Kevin O’Brien: There is a trend toward adjudication in basins, three have been undertaken, and one is underway (Antelope Valley). Adjudication is expensive, but you end up with a judge and watermaster with control over the Basin.

Andrew Sawyer: Surface adjudication lawsuit in court or proceedings with State Water Resources Control Board. Groundwater only can go to court. Difficult, costly. Surface involves individual determinations of everyone’s water rights. With groundwater you end up with simplified formulas. It comes down to the public trust versus legal rights to groundwater. See *City of Barstow v. Mojave Water Agency* (2000). You can’t determine rights without a sense of pumping records.

Kevin O’Brien: It’s not hard for engineers to take crop maps from the Department of Water Resources and get estimates from groundwater pumping.

Dennis O’Connor: With groundwater, it’s don’t ask/don’t tell.

Question: According to Kevin O’Brien, you can’t get information on use, so you can’t advocate.

Andrew Sawyer: We permit water rights, and we don’t want to interfere with recharge. We need more information on groundwater rights. People put in wells just outside of the “surface regulated” area and that makes it hard to regulate a resource that is linked.

Kevin O’Brien: Does the public trust doctrine provide a basis for groundwater regulation? It hasn’t been adjudicated.

Dennis O’Connor, California Senate Committee on Natural Resources and Water

There were both policy and political debates around getting the Senate Bills in the California Water Law Policy Reform Package signed. Five years ago water moved from the Agricultural and Water to the Natural Resources Senate Committee. I gave the Chair water briefings, and asked for options to fix it. She said SB-820.

We have had a recordation program in Southern California since the 1950s. If users extract 20 acre/ feet or more from groundwater they have to report it to the State Water Resources Control

Board. Some groundwater management areas wanted exemption from state recordation, so we said “OK,” and the policy worked. Politically the farmers didn’t like it; groundwater is not a public trust resource, it’s a property right (no, it’s a use right), and use is proprietary.

Orange County has a well-managed groundwater basin.

The Governor wanted a water bond with money for surface storage. Environmentalists wanted groundwater. The Bill was refused many times. It was a very political process.

[Note from Bill Jacobsen: Dennis O’Conner can help with water reform ideas that we might develop. He can be a key ally if we can create a Tribal Waters Rights team that can focus on developing policy and legislative reform documentation and plans.]

Chris Frahm, Brownstein Hyatt Farber Schreck, LLP

Is involved with the Water Replenishment District of Southern California, a new governance model. The Groundwater Resources Association and the California Groundwater Coalition are in favor of groundwater management, not necessarily state regulation regimes.

Dennis O’Connor: Cadiz Groundwater Plan involves storage, conjunctive management, but are they doing monitoring? Looking at the use of remote groundwater basins for storage.